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No. 88-1070, 88-1075 and 88-1385

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor provided adequate notice to non-manufacturers that the hazard communication standard might be extended to them.

2. Whether the Secretary properly extended the hazard communication standard, which initially applied only to the manufacturing sector, to non-manufacturing sectors based on a general finding that the standard is reasonably necessary and appropriate to remedy a significant risk of material harm in those sectors, rather than on industry-specific findings.

3. Whether the Secretary properly determined that extension of the hazard communication standard to the non-manufacturing sectors was technologically and economically feasible.

4. Whether the Secretary's incorporation into the hazard communication standard of a list of hazardous chemicals developed by a private professional and scientific organization (the American Conference of Governmental Industrial Hygienists) constituted an unlawful delegation of rulemaking authority.

5. Whether the court of appeals erred in invalidating the Office of Management and Budget's disapproval, pursuant to the Paperwork Reduction Act of 1980, of certain provisions of the hazard communication standard.

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OPINIONS BELOW

The opinion of the court of appeals in *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated*

Builders) is reported at 862 F.2d 63 (88-1070 Pet. App. 1a-15a; 88-1075 Pet. App. 1a-15a; 88-1385 Pet. App. 1a-15a). The opinion of the court of appeals in *United Steelworkers of America* v. *Pendergrass* (*USWA III*) is reported at 855 F.2d 108 (88-1070 Pet. App. 54a-68a; 88-1075 Pet. App. 24a-37a).

JURISDICTION

The court of appeals entered its judgment in *Associated Builders* on November 25, 1988 (88-1070 Pet. App. 19a-21a; 88-1075 Pet. App. 20a-23a; 88-1385 Pet. App. 19a-21a). The court of appeals entered its judgment in *USWA III* on August 19, 1988, and it denied the government's petition for rehearing on November 28, 1988 (88-1075 Pet. App. 38a-39a). Associated General Contractors, Associated Builders and Contractors, and the National Grain and Feed Association (together with United Technologies Corporation) filed petitions for a writ of certiorari on December 23, 1988, December 28, 1988, and February 21, 1989, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. In 1983, the Secretary of Labor published a final occupational hazard communication standard designed to address comprehensively "the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector" (29 C.F.R. 1910.1200(a)(2) (1984)). See 48 Fed. Reg. 53,280 (1983). The Secretary explained that she was limiting the standard's coverage to the manufacturing sector based on her determination "to first regulate those industries with the greatest demonstrated need" (*id.* at 53,286). On judicial review, the court of appeals held that the limitation to the manufacturing sector was unsupported and directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

United Steelworkers of America v. *Auchter* (*USWA I*), 763 F.2d 728, 736-738, 739 (3d Cir. 1985).

The Secretary thereupon commenced a new rulemaking proceeding and solicited comments on the extension of the hazard communication standard to the non-manufacturing sector. See 50 Fed. Reg. 48,794 (1985). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987). Although the federal government disagreed with that ruling, the Solicitor General determined, after rehearing was denied, not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the

non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987).[1] The Office of Management and Budget (OMB) reviewed the standard pursuant to its authority under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* It disapproved three particular provisions and instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (52 Fed. Reg. 46,075, 46,076, 46,079 (1987)).[2]

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[1] Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). The standard defines the chemical hazards that are covered and sets forth criteria the chemical manufacturers and importers must follow in making hazard determinations; it also incorporates several recognized lists of hazardous chemicals, inclusion on which automatically requires treatment of the chemical as hazardous for purposes of hazard communication (29 C.F.R. 1910.1200(c), (d), and Apps. A-C). Furthermore, the standard requires manufacturing and non-manufacturing employers (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers, and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200(e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

[2] Specifically, OMB disapproved (1) "the requirement that [MSDSs] be provided on multi-employer worksites" through either the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" that is in the same form and concentration as a consumer product, regardless of

2. The revised standard gave rise to two distinct legal challenges. In the first challenge, organizations representing employee interests in *USWA I* and *USWA II* argued that the Secretary was in contempt of the earlier orders when she acceded to OMB's review and disapproval of portions of the standard. More fundamentally, they argued that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while disagreeing that the Secretary was in contempt, agreed with the attack on OMB's authority and invalidated its disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), 855 F.2d 108 (3d Cir. 1988); 88-1075 Pet. App. 24a-37a.

In the second challenge, brought pursuant to 29 U.S.C. 655(f), organizations representing certain non-manufacturing employers argued that the Secretary improperly extended the hazard communication standard to the non-manufacturing sectors. The court of appeals disagreed with that contention and affirmed the validity of the standard. *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated Builders*), 862 F.2d 63 (3d Cir. 1988); 88-1075 Pet. App. 1a-15a. The court concluded that its previous decisions in *USWA I* and *USWA II* largely controlled the outcome of the employer challenge (*id.* at 7a). The court rejected, both as a matter of precedent and on the merits, the employers' argument that the Secretary had failed to provide adequate notice to the non-manufacturing sectors that the agency's final standard

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how the product is used; and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), (e)(2)(i).

might apply to them (*id.* at 10a-11a). It also reiterated its prior holding in *USWA I* that the Secretary had adequately made a general significant risk finding applicable to all workers exposed to hazardous chemicals, and held that the Secretary was not required to make specific findings of significant risk for each affected industry and substance (*id.* at 11a-13a). The court further concluded that the Secretary's feasibility determination was supported by substantial evidence, observing that the main components of the standard applicable to non-manufacturers—training and the maintenance of labels and data sheets—do not even approach the limits of feasibility (*id.* at 13a-14a).

In addition, the court ruled that the Secretary did not unlawfully delegate her rulemaking authority to a private organization (the American Conference of Governmental Industrial Hygienists (ACGIH)) when she incorporated that organization's list of hazardous chemicals into the standard (88-1075 Pet. App. 14a-15a). The court held that the validity of the Secretary's reliance on ACGIH—an "impartial scientific organization"—necessarily followed from its determination in *USWA I* that OSHA was not itself required to evaluate specific chemical hazards, but could impose that duty on the chemical manufacturers (*id.* at 15a). Moreover, the court concluded that adopting the ACGIH list as a floor of covered substances was fully consistent with the OSH Act, which directs OSHA to base its toxic substance standards on the "best available evidence" with due consideration to "the latest available scientific data" (*ibid.*). See 29 U.S.C. 655(b)(5).

ARGUMENT

1. Given the decisions in *USWA I* and *USWA II*, which are now final, the decision of the court of appeals in *Associated Builders* is correct. In any event, that decision

does not present any significant or recurring issues of law, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of that decision is not warranted.

a. Petitioners ABC and NGFA contend (88-1075 Pet. 11-14; 88-1385 Pet. 23-26) that they received inadequate notice because the Secretary issued the revised hazard communication standard without first issuing a proposed rule applicable to non-manufacturers. This contention overlooks the fact that, as the court of appeals exhaustively detailed in *USWA II* and reiterated in the opinion below (88-1075 Pet. App. 10a), "the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding." In 1977, the Secretary issued an Advance Notice of Proposed Rulemaking that was not limited to the manufacturing sector, but invited all "interested persons" to submit information concerning the need for a hazard communication standard. 42 Fed. Reg. 5372, 5373; *USWA II*, 819 F.2d at 1265. This was followed by the 1982 notice of proposed rulemaking which "was at least as explicit." 88-1075 Pet. App. 11a. While proposing to cover only the manufacturing sector, "[t]hat notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included." *Ibid.*; *USWA II*, 819 F.2d at 1266; 47 Fed. Reg. 12,092, 12,101-12,102.[3]

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[3] An earlier 1981 notice of proposed rulemaking, which was subsequently withdrawn for consideration of regulatory alternatives, similarly focused on the manufacturing sector while inviting comment "on the appropriate scope of coverage." 46 Fed. Reg. 4412, 4426; *USWA II*, 819 F.2d at 1265-1266.

Indeed, the court of appeals' remand in *USWA I* was based on that court's conclusion that the Secretary had already provided adequate notice to the non-manufacturing sectors. See *USWA II*, 819 F.2d at 1269. The court concluded that since "what was at issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees," no further evidentiary inquiry was necessary and that the original rulemaking record was adequate for purposes of the remand. *Id.* at 1267; see also *id.* at 1269 (the Secretary could "easily determine []" from the original record the non-manufacturing sectors' ability to comply with the standard); 48 Fed. Reg. 53,280, 53,286 (1983 final rule) (noting comments suggesting "that the scope [of the standard] should be expanded to cover all industries where employees are exposed to hazardous chemicals").

Petitioners' contention that the Secretary's failure to repromulgate a proposed rule for the non-manufacturing sectors violated Section 6(b)(2) of the OSH Act, 29 U.S.C. 655(b)(2), therefore lacks merit, because the earlier notices were legally "sufficient to alert all employers" to the scope issue and the ensuing revised final standard was a "logical outgrowth" of the proposals and the rulemaking that followed. 88-1075 Pet. App. 11a. See also *USWA III*, 88-1075 Pet. App. 36a; *USWA II*, 819 F.2d at 1269; *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The court of appeals correctly held, both as a matter of circuit precedent and on the merits, that the Secretary had provided adequate notice to all employers. See *United Steelworkers of America* v. *Marshall*, 647 F.2d

1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S 913 (1981).[4]

Petitioners additionally argue (88-1070 Pet. 24-25; 88-1075 Pet. 13 n.5; 88-1385 Pet. 24-25) that, regardless of whether OSHA had provided legal notice to all employers, the court erred in cutting off the Secretary's additional round of notice and comment. This argument is unavailing. In *USWA II*, the Secretary defended her post-remand decision to conduct further rulemaking proceedings as well within her administrative discretion. The Secretary believed it would be useful to develop the record on feasibility in the non-manufacturing sectors, which,

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[4] As the court elsewhere held, the holding that the Secretary provided adequate notice also pertains to the several modifications to substantive aspects of the standard that were made in the revised standard: "The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed." *USWA III*, 88-1075 Pet. App. 36a, quoted in *Associated Builders*, 88-1075 Pet. App. 9a. This is certainly true of the change in the definition of "chemical manufacturer," 29 C.F.R. 1910.1200(c), to which petitioner NGFA objects (88-1385 Pet. 25-26 n.18). In keeping with the general broadening of the scope of the standard, this term was redefined solely by eliminating the reference to SIC Codes 20-39 (the manufacturing sector). In almost all cases, the change is purely technical and does not affect the assignment of responsibility for the development of hazard information; it does, however, capture the relatively unusual circumstance (as in the case of grain elevators) where a "chemical" is "produced" (*i.e.*, "manufacture[d], processe[d], formulate[d] or repackage[d]" by an employer outside of SIC Codes 20-39. 29 C.F.R. 1910.1200(c). Moreover, contrary to NGFA's suggestion (88-1385 Pet. 26 n.18), there is nothing incongruous about including grain dust in a hazard communication standard applicable to chemicals; the fact that grain is a food obviously does not mean that its dust is harmless to workers exposed to it in the workplace. See *National Grain & Feed Ass'n* v. *OSHA*, 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

despite the notice given to all employers, was relatively sparse in the original proceeding. When the court nonetheless held that the existing record was adequate to make the feasibility determination and that any further fact-gathering constituted undue delay and must cease, the Secretary sought rehearing en banc. The Secretary argued that the court's order imposed unwarranted limitations on the Secretary's administrative discretion and that a supplemental notice-and-comment rulemaking would, by enhancing the evidentiary record, make an extended standard more fully supportable. Once the court failed to grant rehearing, however, the government decided against seeking certiorari in the belief that further proceedings were not essential, and that the court's action, though unwarranted, would not be fatal to a revised rule. The Secretary's belief proved to be correct: the court below held that, on the basis of the existing record, she made a rational and defensible decision to extend the hazard communication standard to the non-manufacturing sectors.

There is no basis for revisiting now the question of whether the court should have permitted the Secretary the opportunity to complete her supplemental fact-gathering. The Secretary complied fully with the court's order when she issued the revised standard, and that standard must be judged solely on the basis of whether it is supported by substantial evidence in the record under review. It is irrelevant at this point that the Secretary might have developed a more extensive record if she had been permitted to do so.[5]

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[5] Petitioner AGC (88-1070 Pet. 27-28; cf. 88-1075 Pet. 13-14) additionally complains that the court below deprived the parties of meaningful judicial review by holding that certain issues, specifically those relating to the notice and significant risk requirements, had previously

b. Petitioners challenge (88-1070 Pet. 16-19; 88-1075 Pet. 14-16; 88-1385 Pet. 27-28) the court's holding (88-1075 Pet. App. 11a-13a) that the Secretary validly based the revised standard on a general finding of significant risk. The assertion that this holding is in error or in conflict with prior decisions of this Court and other courts of appeals does not withstand scrutiny.

As the court noted (88-1075 Pet. App. 12a, citing *USWA I*, 763 F.2d at 738), the Secretary's significant risk

been decided in *USWA I* or *USWA II* and were consequently binding on the parties. 88-1075 Pet. App. 10a-11a; see also *id.* at 15a. According to AGC (Pet. 27), this application of stare decisis undermined traditional standing principles because petitioners, who were not covered under the original standard, could not previously have challenged it in the court of appeals. See 29 U.S.C. 655(f). The implication, AGC warns (88-1070 Pet. 27), is that "[t]o preserve their right to challenge these findings * * * petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector." But the court of appeals also made alternative holdings that, aside from stare decisis, it independently believed that the Secretary had met the relevant notice and significant risk requirements. 88-1075 Pet. App. 10a-11a. Furthermore, it is clear that the principle of stare decisis, as codified in Third Circuit Internal Operating Procedure 8C, applies regardless of whether the parties in this case participated in the earlier proceeding. The court's invocation of this principle was unexceptional, and, consistent with IOP 8C, if petitioners thought that de novo review was merited notwithstanding the circuit precedent, they should have sought rehearing en banc.

In any event, there is nothing ominous about the result predicted by petitioners. The rules on intervention permit non-parties the opportunity to protect their interests in ongoing litigation; and there is no incompatibility between saying petitioners had no standing to challenge the original standard and saying they could have intervened as respondents to defend the Secretary's decision to limit its scope. Moreover, it is noteworthy that AGC does not assert that the Secretary inadequately represented its interest on this point in *USWA I* and *II*. It is also noteworthy that petitioners successfully intervened in *USWA III*.

finding in the original rulemaking "applied to all workers who would be exposed to hazardous chemicals." See also *USWA I*, 763 F.2d at 738 (noting record evidence that employees in sectors other than manufacturing are also exposed to hazardous chemicals and are in need of hazard information). In particular, the Secretary made an across-the-board determination that "inadequate communication about serious chemical hazards endangers workers," that "the standard will increase employee awareness of the potential health and safety risks associated with industrial chemicals[,] should result in increased [employee] use of personal protective devices, improved work practices, and other precautionary measures [, and] * * * should result in more safety-enhancing investments" by employers due to their increased knowledge about safety and health hazards, and that consequently the standard can be expected to yield a long-term significant reduction in chemical-source illnesses and injuries. 48 Fed. Reg. 53,280, 53,321, 53,328-53,329 (1983). Thus, the Secretary did "not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards." *USWA II*, 819 F.2d at 1267 (quoting 48 Fed. Reg. 53,286 (1983)). Although the Secretary initially chose to limit the scope of the standard to the manufacturing sector,[6] it was precisely the in-

[6] In *USWA I*, the court stated that Section 6(g) of the OSH Act, 29 U.S.C. 655(g), while permitting the Secretary "to set priorities for the use of the agency's resources and to promulgate standards sequentially," could not be used to justify limiting the standard to the manufacturing sector where the Secretary had failed to explain "not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. AGC (88-1070 Pet. 25-26) urges this Court to grant review on this question of the Secretary's priority-setting discretion. The govern-

congruity between her general risk findings and the standard's limited scope that prompted the court to confine its remand to the feasibility of the standard, as opposed to its need, in the non-manufacturing sectors. 88-1075 Pet. App. 12a; *USWA II*, 819 F.2d at 1267, 1270; *USWA I*, 763 F.2d at 737, 739.[7]

Moreover, in the course of making her post-remand feasibility determination, the Secretary "accumulated evidence to indicate that some employees in every SIC code designation are exposed to hazardous chemicals." 52 Fed. Reg. 31,852, 31,858 (1987); compare 48 Fed. Reg. 53,280, 53,284-53,286 (1983). She specifically referred to record evidence on the need for the standard for supermarket workers, hospital workers, barbers and beauticians, longshore workers, utility workers, dry cleaning and laundry workers, and farmworkers. 52 Fed. Reg. 31,852, 31,857 (1987). She also emphasized the long history of consultation with the OSHA Advisory Committee on Construction Safety and Health, which has repeatedly recommended a hazard communication standard for construction workers and estimated that 70% of all construction workers are exposed to chemical hazards. *Id.* at 31,857-31,858, 31,871 (Table 2; SIC codes 15-17).

The court of appeals was thus correct to conclude that the Secretary's significant risk determination met the threshold requirement for the issuance of an OSHA stand-

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ment, however, did not seek certiorari on this ruling and believes that the Secretary's subsequent extension of the standard to cover all employers has mooted the issue.

[7] See 50 Fed. Reg. 48,794, 48,795 (1985) ("the need for the standard has already been demonstrated, and the information required at this point is to establish the current status of hazard communication within the industries outside manufacturing, and the appropriateness of covering those industries in a manner similar to the coverage of manufacturing in the current rule").

ard. The purpose of the rulemaking was to develop a generic hazard communication standard. The Secretary's focus was therefore appropriately on whether the general failure of chemical manufacturers to disseminate adequate information about hazardous chemicals and of employers to provide their employees with such information posed a significant occupational safety and health risk and on whether OSHA could significantly reduce this risk through the development of appropriate standards. Having found, as a general matter, that a uniform hazard communication standard was necessary to remedy this universal problem (see, *e.g.*, 52 Fed. Reg. 31,850, 31,859 (1987) (discussing need for a single standard), 48 Fed. Reg. 53,280, 53,323-53,324 (1983) (discussing market failure)), the Secretary was under no further obligation to repeat her risk analysis for each of the 70 two-digit SIC codes that encompass the entire spectrum of economic activities in the private sector. Indeed, as the court below accurately concluded, "[a] requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible." 88-1075 Pet. App. 13a.[8]

Accordingly, contrary to petitioners' contentions (88-1070 Pet. 18; 88-1075 Pet. 14, 16; 88-1385 Pet. 27-28), the decision below is not at all in conflict with *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607

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[8] In issuing the standard, the Secretary estimated that there were as many as 575,000 hazardous chemical products, with thousands more introduced every year. 48 Fed. Reg. 53,280, 53,323 (1983).

(1980) (plurality opinion), in which the significant risk requirement under the OSH Act was first discussed. As this Court there explained, Section 3(8) of the OSH Act, 29 U.S.C. 652(8), requires the Secretary to find that a standard is reasonably necessary and appropriate to remedy significant workplace risks. 448 U.S. at 639. Nothing in that decision suggests, however, that a standard aimed at risks common to all industries is invalid unless the Secretary has first established the significance of the risk and the efficacy of the required practices in each and every one of the affected sectors. On the contrary, the Court emphasized that the Secretary, who retains the discretion to define the acceptable level of risk, "has no duty to calculate the exact probability of harm" and "is free to use conservative assumptions in interpreting the data * * *, risking error on the side of overprotection rather than underprotection." 448 U.S. at 655-656. Significantly, the Court also noted that the Secretary may impose certain "information-gathering" requirements below the level of risk needed to establish a permissible exposure limit for a specific toxic substance as a means of protecting unusually susceptible individuals or determining whether lower limits should be set. *Id.* at 658 & n.66. See also *id.* at 662-664 (Burger, C.J., concurring) (the Secretary has substantial discretion in making significant risk determinations). The lower court's recognition (88-1075 Pet. App. 13a) that a "general finding [of significant risk] concerning all potentially covered industries" must of necessity be sufficient to support a "performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries" therefore is fully consistent with *Industrial Union Department.*[9]

[9] Petitioners also err in asserting (88-1075 Pet. 14; 88-1385 Pet. 27) that the decision below conflicts with *American Textile Mfrs. Inst.* v.

Petitioners' contention (88-1070 Pet. 16-18; 88-1075 Pet. 15; 88-1385 Pet. 27-28) that this Court's review is warranted because the decision below conflicts with decisions of the Fourth, Fifth and District of Columbia Circuits dealing with the significant risk requirement also misses the mark. In *Texas Indep. Ginners Ass'n* v. *Marshall,* 630 F.2d 398, 406-409 (1980), the Fifth Circuit struck down the Secretary's standard for the cotton ginning industry in part for failure to make an adequate significant risk finding.[10] There, the Secretary had determined that a different standard than the one she had issued for the rest of the cotton industry was necessary to protect cotton gin workers, but she had not supported this determination with substantial evidence of significant risk at the much lower exposure levels and in the less harmful working conditions that are prevalent in the domestic cotton ginning industry. Here, by contrast, the Secretary recognizes the need for a uniform hazard communication standard to cover all industries because lack of information about a hazardous chemical poses a significant risk to a worker regardless of the exact conditions of use and because the chemical manufacturers, who must bear the primary responsibility for providing hazard information, generally distribute the chemicals in a single stream of commerce.

Donovan, 452 U.S. 490, 536-540 (1981). The Court there invalidated a portion of the OSHA cotton dust standard because the Secretary had included a wage guarantee requirement for reasons of general fairness unrelated to safety and health; the Court nowhere held that the OSH Act requires a separate significant risk justification for each provision of a standard when the goal to advance occupational safety and health is not in doubt.

[10] The Fifth Circuit's independent holding that the standard was invalid because the Secretary failed to perform cost-benefit analysis was discredited by this Court in *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. 490, 510-511 n.30 (1981).

See 52 Fed. Reg. 31,852, 31,859, 31,864 (1987); 48 Fed. Reg. 53,280, 53,295-53,296 (1983). Moreover, *Texas Independent Ginners* involved a standard setting, *inter alia*, specific control requirements. There is a fundamental distinction between that kind of standard and a performance-oriented, informational standard such as hazard communication. See 88-1075 Pet. App. 13a; *Louisiana Chemical Ass'n* v. *Bingham*, 550 F. Supp. 1136, 1146 (W.D. La. 1982), aff'd per curiam, 731 F.2d 280 (5th Cir. 1984); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 580 (1979).

The other two cases relied on by petitioners are simply inapposite. In *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1454-1455 (1985) (en banc), the Fourth Circuit ruled that the Secretary acted within her discretion when she included the tree care industry within the general hearing conservation standard, even though that industry purportedly has many of the same characteristics as the oil and gas drilling industry, which the Secretary had decided to exclude from the general standard and to cover in a separate comprehensive standard. And in *United Steelworkers of America* v. *Marshall*, 647 F.2d at 1309-1310, the D.C. Circuit upheld the Secretary's exclusion of the construction industry from the lead standard on grounds of feasibility, not significant risk.

In sum, nothing in these cases stands for a general legal principle that the Secretary must separately assess the risk in every industry to be covered by a single standard once the Secretary has determined that they all share a common significant risk or that the Secretary is required under the "reasonably necessary and appropriate" language of Section 3(8) to subject each facet of such a standard to

industry-by-industry risk analysis. See 88-1070 Pet. 21-23; 88-1075 Pet. 14-15; 88-1385 Pet. 28.[11]

c. Petitioners' argument (88-1070 Pet. 19-21; 88-1075 Pet. 16-18; 88-1385 Pet. 28-29) that the court improperly shifted the Secretary's burden of proving the technological and economic feasibility of the standard is also erroneous. Under the statute, the Secretary must issue toxic substance standards that "to the extent feasible" assure that no worker is subject to material harm resulting from hazardous working conditions. 29 U.S.C. 655(b)(5). The Secretary's burden is therefore to establish, by substantial evidence, that the standard does not exceed the limits of technological or economic feasibility. *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. at 508-509, 513 n.31. The court of appeals' observation that the rulemaking record "contained no credible evidence that the standard would be technologically or economically infeasible" (88-1075 Pet. App. 14a) in the non-manufacturing sector

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[11] In any event, there can be no doubt that there is a significant risk in the construction industry, where more than 70% of all employees are exposed to hazardous chemicals. See 52 Fed. Reg. 31,852, 31,871 (1987) (Table 2; SIC codes 15-17). Moreover, contrary to petitioner ABC's argument (88-1075 Pet. 15), this risk is not eliminated by existing OSHA requirements (29 C.F.R. 1926.21) that construction workers be trained in the use of hazardous materials because, absent the hazard communication standard, there is no corresponding obligation for suppliers to provide the necessary hazard information to the contractors and no requirement for the maintenance on site of warning labels and material safety data sheets or for the development of written hazard communication plans. 88-1075 Pet. App. 13a. Likewise, the hazards associated with grain dust are well known and establish the existence of a significant risk in the grain and feed industry warranting its coverage by a hazard communication standard. *Ibid.* See *National Grain & Feed Ass'n* v. *OSHA,* 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

constitutes a finding that the Secretary met that burden here.

Indeed, the Secretary not only concluded that the record contained no "credible evidence indicating the standard would be infeasible for any individual sector"—thereby responding to the exact terms of the remand order in *USWA II*, 819 F.2d at 1270—but she also affirmatively found that "the original record on the whole supports a finding that the performance-oriented [standard] is feasible for all industries." 52 Fed. Reg. 31,852, 31,855 (1987). The Secretary based this finding in part on the fact that feasibility had already been established in the manufacturing sector, in which the chemical manufacturers in particular bear by far the largest compliance burden of any employer group; in part on experience gained under the original standard and in states that had already extended hazard communication requirements to the non-manufacturing sectors; and in part on record evidence from employers and employees in the non-manufacturing sectors indicating that the standard would be practical in their sectors. 52 Fed. Reg. 31,853, 31,855-31,857 (1987). The Secretary found further support for her finding in a post-remand regulatory analysis that quantified the Secretary's cost estimates on an industry-by-industry and establishment-size basis and concluded that the costs for the non-manufacturing sectors (including construction) would fall within the ranges already established and determined to be reasonable for the manufacturing sector. *Id.* at 31,869-31,874; compare 48 Fed. Reg. 53,280, 53,332-53,334 (1983).[12]

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[12] This regulatory analysis, together with other evidence that was accumulated since *USWA I*, filled in the perceived gaps in the original record that the Secretary identified in the rehearing petition following *USWA II*. See 88-1070 Pet. 10-11. Furthermore, the Secretary

Thus, the court of appeals not only applied a correct legal test, but it properly concluded that the standard's requirements "hardly approach the limits of feasibility" and that the Secretary's feasibility determination for the non-manufacturing sectors "is on the agency record completely supportable" (88-1075 Pet. App. 14a). That determination does not warrant further review.

d. Petitioner NGFA additionally contends (88-1385 Pet. 9-19) that the court of appeals erred in upholding the Secretary's reliance on the ACGIH *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* (latest edition) (TLV list) to provide a mandatory floor of hazardous substances that are automatically covered by the hazard communication standard. The principal argument (88-1385 Pet. 10-14) is that the Secretary is required to make a significant risk determination with respect to each regulated substance, and that the Secretary never made that threshold determination concerning grain dust and other substances included in the TLV list, because that responsibility has been unlawfully delegated to a private organization.

This argument is deeply flawed. Like the significant risk challenge discussed above, NGFA's delegation argument is based on the fundamental misperception that the

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recognized that the issue with respect to the non-manufacturing sectors was largely "the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training." *USWA II*, 819 F.2d at 1266. See also *id.* at 1267; *USWA I*, 763 F.2d at 738-739. The Secretary intentionally designed a performance-oriented standard permitting an individual employer to adopt different cost-effective strategies for meeting the standard's requirements and made several changes in the standard to make it more suitable for non-manufacturing workplaces. 52 Fed. Reg. 31,852, 31,860 (1987); 48 Fed. Reg. 53,280, 53,281-53,282 (1983); 88-1075 Pet. App. 9a, citing *USWA III*, 855 F.2d at 113.

Secretary was under an obligation to determine separately the risk associated with each substance potentially covered by the standard. Rather, the Secretary was required to determine that lack of hazard communication generally posed a significant risk to workers, and that a standard was reasonably necessary and appropriate to reduce the risk. Thus the focus of the rulemaking was appropriately directed toward defining the categories of hazards (not specific chemicals) to be covered by the standard and toward developing a workable methodology for establishing which chemicals would be subject to the standard's hazard communication requirements.

Based on an extensive rulemaking record, the Secretary determined that the most protective hazard communication standard could be achieved only by placing the responsibility for hazard determination on the chemical manufacturers. 48 Fed. Reg. 53,280, 53,286-53,289 (1983); 88-1075 Pet. App. 15a; *USWA I*, 763 F.2d at 739 (upholding OSHA's hazard determination procedure over the suggested alternative of exclusive reliance on government-generated lists of hazardous chemicals). See 29 C.F.R. 1910.1200(c) (definitions of "health hazard" and "physical hazard"), (d) ("hazard determination"), and Appendices A-C.[13] NGFA does not challenge the Secre-

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[13] More specifically, the standard requires each chemical manufacturer or importer to evaluate the hazards of chemicals produced in its workplace or imported by it. 29 C.F.R. 1910.1200(d). The standard sets out the categories of health and physical hazards to be evaluated, provides criteria for evaluating the "available scientific evidence" on each hazard category, and includes a non-mandatory list of references that could aid the hazard determination process. 29 C.F.R. § 1910.1200(c), (d), and Appendices A-C. According to the prescribed criteria, the chemical manufacturer or importer must treat as hazardous—and therefore develop a container label for and MSDS including the relevant hazard information on—any chemical for which

tary's imposition of that duty on the chemical manufacturers. Yet, the Secretary's incorporation of certain mandated lists, including the TLV list, into this requirement was part and parcel of this regulatory decision; having invested the chemical manufacturers with considerable discretion to determine which chemicals are hazardous, she determined the need to limit that discretion by, among other methods, putting an objective "floor" under the hazard determination process. 48 Fed. Reg. 53,280, 53,299, 53,336 (1983).[14]

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there is "at least one positive study conducted in accordance with established scientific principles" finding adverse health effects, as defined by the standard. 29 C.F.R. § 1910.1200(d)(2). In addition, the standard mandates that the chemical manufacturer or importer shall consider to be hazardous any chemical that is included on one of several well-known lists of hazardous chemicals. 29 C.F.R. § 1910.1200(d)(3), (4). One of the prescribed sources of information is the latest edition of the ACGIH TLV list. 29 C.F.R. § 1910.1200(d)(3)(ii).

ACGIH "is an impartial scientific organization which identifies safe exposure levels for various substances." 88-1075 Pet. App. 15a. Its membership is limited to professionals in governmental agencies or educational institutions engaged in occupational safety and health programs. A TLV (threshold limit value) is a recommended airborne concentration and represents conditions under which nearly all workers may be repeatedly exposed daily without adverse effect. ACGIH's TLVs are established by committees of recognized experts who review the available scientific literature. For instance, before adopting a TLV for grain dust, it solicited public comment and relied on 36 scientific studies or reports. ACGIH, *Documentation of the Threshold Limit Values and Biological Exposure Indices* 288-289.2 (5th ed. 1986). The ACGIH TLV list, which currently includes approximately 600 substances, is updated annually.

[14] At bottom, the TLV list simply provides a readily-available source of credible scientific information. For example, NGFA strenuously objects to ACGIH's inclusion of oat, wheat, and barley dust on its TLV list. But as noted *supra* (note 13), ACGIH based its

The inclusion of mandated lists was thus a common sense response to apparent deficiencies in the proposed hazard determination process, which assigned chemical manufacturers the responsibility for making hazard determinations without a corresponding check on their broad discretion. 47 Fed. Reg. 12,092, 12,121, 12,123 (1982 proposal). See 48 Fed. Reg. 53,280, 53,286-53,288 (1983 discussion of rulemaking record). In particular, the Secretary's choice of the TLV list to form a floor under the hazard determination process responded to repeated comments that the list is routinely used by responsible industrial hygienists as an authoritative source of information on well-known hazardous substances. *Ibid.*[15]

The court correctly concluded (88-1075 Pet. App. 15a) that the use of the TLV list in conjunction with the chemical manufacturers' independent duty to research and assess hazards was both "appropriate" and fully consistent

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TLV for grain dust on 36 scientific studies and reports. If only one of these contains "evidence which is statistically significant" and was based on a study "conducted in accordance with established scientific principles," the standard requires grain dust to be treated as a health hazard *regardless* of its status on the TLV list. 29 C.F.R. 1910.1200(d)(2). Moreover, "the propensity of grain elevators to blow up" (88-1075 Pet. App. 13a) makes grain dust, in any event, a "physical hazard" subject to the standard. As a practical matter, therefore, the inclusion in 1986 of oat, wheat, and barley dust on the TLV list did not significantly add to the obligations that employers in the grain industry incurred when the standard was extended to apply to non-manufacturers.

[15] Interested parties, including NGFA, had every opportunity to participate in the rulemaking and to add to the record on appropriate hazard determination methods. Furthermore, Section 6(f) of the OSH Act, 29 U.S.C. 655(f), provided them with the right to seek pre-enforcement judicial review of the Secretary's regulatory decision. There was accordingly no unfairness in the way the Secretary incorporated the TLV list into this standard.

with the Secretary's statutory authority to set standards.[16] The hazard determination scheme, including the incorporation of the mandated lists, was obviously in fulfillment, not derogation, of this mandate.[17]

Furthermore, NGFA clearly misses the mark (88-1385 Pet. 19-22) when it argues that the Secretary somehow crossed the line that demarcates constitutional delegations

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[16] Congress directed the Secretary to achieve the OSH Act's goal of safe and healthful working conditions for all Americans in part by "developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. 651(b)(5). Moreover, Section 6(b)(5), 29 U.S.C. 655(b)(5), which governs the issuance of toxic substance standards, directs the Secretary to base the standards on "the best available evidence" and with due consideration given to "the latest available scientific data"; it also states a preference for standards expressed in terms of "objective criteria and of the performance desired." In addition, Section 6(b)(7), 29 U.S.C. 655(b)(7), prescribes standards for labels and other forms of warning to "insure that employees are apprised of all hazards to which they are exposed." Cf. 29 U.S.C. 657(g)(2) (the Secretary has general authority to "prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities under this [Act]"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980).

[17] NGFA argues (88-1385 Pet. 14-18) that Congress could not have intended the Secretary to incorporate the recommended standards of private organizations into Section 6(b) standards because, in Section 6(a), it specifically authorized the adoption, without rulemaking, of previously-established national consensus and federal standards for only the first two years following the effective date of the OSH Act. See 29 U.S.C. 655(a). The fact, however, that Congress, out of concern for procedural fairness to the regulated community, limited the time in which the Secretary was permitted to adopt existing standards as final OSHA standards without full rulemaking does not imply that it similarly prohibited the Secretary from concluding, based on a complete rulemaking record, that the incorporation by reference of particular hazard determinations in a private standard into a comprehensive Section 6(b) standard is reasonably necessary or appropriate.

of rulemaking authority.[18] This Court has long recognized that the legislature—or, as in this case, a standard-setting agency acting pursuant to delegated authority—may seek private assistance in "matters of a more or less technical nature." *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 537 (1935). See *Cospito* v. *Heckler,* 742 F.2d 72, 87-88 n.25 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985). In general, delegations of this sort pass constitutional muster so long as the delegatee provides needed practical expertise, is not likely to exercise its limited authority in a biased or self-aggrandizing manner, and does not replace the governmental entity as the ultimate policymaker regarding the matter being regulated. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398-400 (1940). These criteria are obviously satisfied in this case.[19]

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[18] Significantly, the courts of appeals uniformly have upheld the constitutionality of the Secretary's authority to issue Section 6(a) standards, which, as noted *supra* (note 17), involve the wholesale adoption, without rulemaking, of national consensus standards developed by certain private organizations. *Towne Constr. Co.* v. *OSHRC,* 847 F.2d 1187, 1189 (6th Cir. 1988); *Modern Drop Forge Co.* v. *Secretary of Labor,* 683 F.2d 1105, 1110 (7th Cir. 1982); *Noblecraft Indus., Inc.* v. *Secretary of Labor,* 614 F.2d 199, 203 (9th Cir. 1980). Moreover, many of these Section 6(a) standards themselves incorporate privately established standards by reference. *Towne Constr. Co.,* 847 F.2d at 1189. Cf. *Todd & Co.* v. *SEC,* 557 F.2d 1008, 1012 (3d Cir. 1977) (upholding SEC's reliance on private security dealer association's disciplinary procedures).

[19] The Secretary did not delegate to ACGIH the policy-making role of setting a hazard communication standard or even of devising the requirements for hazard determination; rather, the Secretary simply required the use of ACGIH's existing TLV list, among other specified lists and criteria, as a source of public information in the hazard determination process. Moreover, the Secretary adopted ACGIH's TLV list

2. Petitioner ABC also challenges (88-1075 Pet. 18-19) the court of appeals' decision in *USWA III*, which held that OMB lacked authority under the Paperwork Reduction Act to disapprove certain provisions of the Secretary's hazard communication standard. The Acting Solicitor General has filed a petition for a writ of certiorari challenging that decision as well. See *Dole* v. *United Steelworkers of America,* No. 88-1434 (filed Feb. 27, 1989). We suggest that this Court grant the government's petition, rather than ABC's. First, as ABC seems to recognize (88-1075 Pet. 18-19), the question presented by that case is far more important to the federal government than to any individual litigant. As the government's petition explains in detail, the court of appeals' decision will substantially interfere with OMB's responsibility to review a wide range of federal information collection activities. Second, ABC's petition primarily challenges the *Associated Builders* decision, and provides only a cursory discussion of issues presented by the *USWA III* decision.

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with full knowledge that ACGIH is a well-respected professional organization with specific expertise in the area of hazard determination, that it is not itself a chemical manufacturer with responsibility for hazard determinations under the standard or in an adversarial position vis-à-vis any segment of the regulated community, and that the TLV list historically has been developed based on stringent scientific criteria.

NGFA makes much of the fact (88-1385 Pet. 13, 22) that ACGIH is not bound by the same procedural and substantive limitations that constrain the Secretary in setting OSHA standards. But neither are the chemical manufacturers when they perform hazard determinations, nor, for that matter, are the scientists upon whose studies they must base their evaluations. Quite simply, hazard determination, whether done by ACGIH or a chemical manufacturer, is not the same as standard-setting. Moreover, if the regulated community has a credible basis for objecting to ACGIH's future hazard determinations, it may petition the Secretary for modification of the standard. See 29 U.S.C. 655(b); 29 C.F.R. 1911.3.

And third, ABC, which was an intervenor in *USWA III*, will have a full opportunity to present its views as a respondent to the government's petition. Under these circumstances, we believe that it would be appropriate to deny ABC's petition in full.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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